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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-499

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

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NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1992 ; Released: November 19, 1992

Comment date: January 4, 1993
Reply comment date: January 19, 1993

By the Commission: Commissioner Quello issuing a statement.

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I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Act") was enacted.[1] By this Notice of Proposed Rule Making ("Notice"), we seek comment on the adoption of implementing regulations relating to mandatory television broadcast signal carriage and retransmission consents.

II. BACKGROUND

2. The Cable Act of 1992 contains two provisions that fundamentally alter the relationship that has existed in recent years between cable television systems (and other "multichannel video programming distributors") and the broadcast stations whose signals they distribute to their subscribers. The first of these provisions addresses the rights of "local" commercial and noncommercial television broadcasters to carriage on cable television systems on a mandatory basis. The second provision, in certain defined circumstances, prohibits cable operators and other multichannel video programming distributors from carrying the signals of television stations without first obtaining their consent. The mandatory carriage provisions essentially restore a type of obligation that was included in the Commission's rules from 1965 until 1985.[2] The retransmission consent provisions apply to cable operators and other multichannel video programming distributors, and they are similar to requirements that have applied to the transmission by one broadcaster of the signal of another broadcaster since the Communications Act was adopted in 1934. The two provisions are related in that, with respect to local cable carriage, broadcasters on a system-by-system basis must make a choice once every three years whether to proceed under the mandatory carriage rules or whether their relationship with system operators will be governed by the retransmission consent requirement. Although the provisions are related by virtue of that option, they are otherwise substantively quite distinct, with each provision functioning in a separate fashion once a selection is made. Thus, the inclusion of both issues in a single proceeding is simply a matter of administrative convenience and not an indication that the matters are not severable.

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. (1992).

[2] The Commission's must-carry rules were invalidated by the U.S. Court of Appeals for the District of Columbia Circuit in Quincy Cable TV, Inc. v. FCC (Quincy), 768 F. 2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). See also Century Communications Corp. v. FCC, 835 F. 2d 292 (D.C. Cir. 1987), clarified, 837 F. 2d 517, cert. denied, 4863 U.S. 1032 (1988) (invalidating a subsequent set of must-carry rules). We note that the pending Second Further Notice of Proposed Rule Making in MM Docket No. 90-4 sought comment on the adoption of must-carry requirements in conjunction with the Commission's effective competition standard. See 6 FCC Rcd 4545 (1991). In light of the mandatory carriage requirements of the 1992 Act, we terminate that proceeding.

3. Specifically at issue in this proceeding are Section 4 of the Cable Act of 1992, which contains the mandatory signal carriage provisions for commercial stations, Section 5, which contains analogous rules for noncommercial stations, and Section 6, which contains the retransmission consent provisions. The noncommercial carriage provisions contain no specific effective date and thus, under the structure of the 1992 Act, become effective on December 4, 1992 (60 days after enactment). The Commission is directed to issue rules implementing the commercial station carriage provisions and to complete its rulemaking on rules governing the exercise of retransmission consent rights within 180 days.[3]

4. The legislative history of the 1992 Act contains an extensive discussion of the rationale and legal analysis of these must-carry and retransmission consent provisions.[4] We will not repeat Congress' findings here. To provide the context for this proceeding, however, we note that the 1992 Act and its legislative history evidence Congress' conclusion that there is a substantial governmental interest in ensuring that cable subscribers have access to local commercial and noncommercial broadcast stations. Further, the 1992 Act and its legislative history indicate that Congress has determined that the must-carry and channel positioning provisions of the 1992 Act are needed to protect the system of free, over-the-air television broadcasting and to promote competition in local markets. Specifically, Congress has concluded that such regulation is needed to ensure a competitive balance between cable systems and broadcast stations. With respect to retransmission consents, Congress has concluded that a substantial portion of the fees subscribers pay to cable systems is attributable to the value subscribers place on viewing broadcast signals. Prior to the 1992 Act, however, cable operators have not been required to seek the permission of the originating broadcaster before carrying its signal, nor have they been required to compensate the broadcaster for the value of its signal. To remedy this situation, Congress included in

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[3] Section 4, in addition, provides that no cable operator shall be required to provide or make available any "input selector switch as defined in section 76.5(mm)" of the Commission's rules or provide information to subscribers regarding such a switch. The Commission is provided no discretion in this regard. Accordingly, as of December 4, 1992, the effective date of the Cable Act, we will regard the existing requirements obliging system operators to provide input selector switches and information about their availability to be of no further force or effect and the rule in question (47 C.F.R. § 76.66) will be deleted as part of this proceeding. Cable operators are reminded, however, that they must continue to be concerned with the potential for interference related to input selector switches that are provided on a voluntary basis or are connected by subscribers on their own.

[4] See House Committee on Energy and Commerce, H.R. Rep. No. 628 ("House Report"), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H.R. Rep. No. 862 ("Conference Report"), 102d Cong., 2d Sess. (1992), reprinted at Cong. Rec. H 8308 (Sept. 14, 1992).

the 1992 Act a provision permitting broadcasters to seek compensation from cable operators and other multichannel providers for carriage of their broadcast signals.

5. In this proceeding, we seek comment on how the must-carry and retransmission consent provisions of the Cable Act of 1992 should be incorporated into the Commission's rules.

III. MUST-CARRY REGULATIONS

A. Carriage of Local Noncommercial Educational Television Stations

6. The 1992 Act does not specifically direct the Commission to adopt rules to effectuate the new statutory must-carry requirements for noncommercial educational (NCE) television stations, nor does it set a separate effective date for this section. Thus, these statutory requirements for NCE stations become effective on December 4, 1992, the effective date for provisions of the Cable Act of 1992 unless otherwise specified.[5] Because we intend to codify these statutory must-carry provisions into the Commission's rules, however, we seek comment regarding any clarifications to these requirements that may be warranted.

7. Definition of Qualified Local NCE Station. Section 615 provides that certain NCE television stations are entitled to must-carry privileges on cable systems in or near their service area. Pursuant to Section 615(l)(1), an NCE station will qualify for must-carry rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, corporation or association, and if that licensee is eligible to receive a community service grant from the Corporation for Public Broadcasting.[6] In the alternative, an NCE station will be considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. Specifically included in the definition are translators of any NCE television station with

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[5] The carriage obligations imposed generally do not conflict with existing rule requirements. There is one area, however, where the statute, on its effective date, necessarily alters an existing rule. Section 615(f) provides that a qualified local noncommercial educational television station whose signal is carried by a cable system "shall not assert any network nonduplication rights it may have pursuant to section 76.92 ... to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that operator." Consequently, as of December 4, 1992, the nonduplication rights of noncommercial educational television stations set forth in Section 76.92 of the Commission's rules will be subject to the limits set forth in the statute. Thus, as between qualified local noncommercial educational television stations, no network nonduplication requirements will be enforced. The specific rules in question will be revised accordingly in the course of this proceeding.

[6] See 47 U.S.C. § 396(k)(6)(B).

five watts or higher power serving the franchise area, full-service stations or translators licensed to channels reserved for noncommercial educational use pursuant to Section 73.606 of the Commission's rules, and any such stations and translators operating on channels not so reserved that the Commission determines are qualified as NCE stations. Section 615(l)(2) defines a qualified local NCE station as a qualified NCE station licensed to a principal community whose reference point, as defined in Section 76.53 of the Commission's rules, is within 50 miles of the principal headend of the cable system, or whose Grade B service contour, as defined in Section 73.683(a) of the Commission's rules encompasses the principal headend of the cable system.

8. We seek comment on various aspects of this definition. First, with respect to municipal NCE stations, what criteria should be used to determine whether such a station "transmits predominantly noncommercial programs for educational purposes" pursuant to the 1992 Act? We propose to consider a municipal NCE station eligible to invoke the must-carry rules if it transmits noncommercial educational programming for at least 50 percent of its broadcast week. Another alternative would be to specify a minimum number of hours per week that must be devoted to educational programming to qualify for must-carry status. We further propose to define "educational purposes" pursuant to Section 73.621(a) of the Commission's rules.[7] We also seek comment on when, if ever, we should grant NCE status to stations or translators operating on channels other than those reserved for noncommercial educational use. We further note that the term "principal headend" is not defined in the 1992 Act but is a key element for determining when a qualified NCE station is "local." We propose, for purposes of the must-carry rules, to require a cable operator with multiple headend facilities to initially choose its principal headend, as long as the choice is not intended to circumvent must-carry obligations.[8] What procedures should be established regarding a cable operator's obligation to select a principal headend and to inform the Commission of that choice? Should the cable operator's selection be effective indefinitely? Under what circumstances should a cable operator be permitted to change its principal headend? Is there a need to include any additional reference points in Section 76.53?

9. Signal Carriage Obligations. Section 615(b) sets forth the general requirement that cable operators carry all qualified local NCE signals requesting carriage. The 1992 Act makes exceptions for small and medium-sized systems. Specifically, systems with 12 or fewer usable activated channels[9]

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[7] 47 C.F.R. § 73.621(a). This section sets forth the eligibility requirements for licensees of noncommercial educational television stations.

[8] We note that in the Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864, 887 (1986) (the post-Quincy must-carry rules), the Commission similarly permitted cable operators with multiple headend facilities to choose their own principal headends.

[9] Section 2(c)(5) of the 1992 Act defines "activated channels" as "those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system,

must carry the signal of one qualified local NCE television station. If such a system operates beyond the presence of a qualified local NCE television station, that system shall import and carry a qualified NCE station. If no channel capacity is available to comply with these carriage requirements, such operators will not be required to remove any programming service provided to subscribers as of March 29, 1990, but must use the first channel that subsequently becomes available.

10. Systems with 13 to 36 usable activated channels must carry the signal of all local NCE stations up to a total of three local NCE stations. If such a system operates beyond the presence of a qualified local NCE television station, the cable operator shall import and carry at least one qualified NCE station. Further, if an operator of a system with 13 through 36 channels carries the signal of a qualified local NCE station that is affiliated with a state public television network, that operator shall not be required to carry the signal of any additional local NCE stations affiliated with the same network, if the programming of the additional stations is substantially duplicated by the programming of the local NCE station being carried.

11. Systems with a capacity of more than 36 usable activated channels are generally required to carry the signals of all qualified local NCE stations requesting carriage.[10] Depending on the characteristics of the area in which the system is located, this rule could require carriage of many NCE stations. The 1992 Act, however, makes an exception for these large systems with respect to NCE stations that air duplicative programming. The 1992 Act provides that those systems required to carry at least three qualified local NCE stations shall not be required to carry the signals of additional local NCE stations if the programming of those additional stations substantially duplicates the programming broadcast by a qualified local NCE station requesting carriage. The 1992 Act directs the Commission to define "substantial duplication" in a manner that promotes access to distinctive NCE television services.

12. We seek comment on implementation of these statutory provisions. We propose that if a small or medium-sized cable system receives multiple requests for carriage, it should have discretion to select the station(s) it will carry, subject to the requirements of Section 615(c), discussed below, regarding

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regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use." In addition, Section 2(c)(7) defines "usable activated channels" as "activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as defined by the Commission." We propose to add these definitions to Section 76.5 of the Commission's rules.

[10] In addition, Section 615(b)(3)(ii)(D) of the Act provides that a system with 36 or fewer usable activated channels that increases its channel capacity to more than 36 channels must then carry each qualified local NCE station requesting carriage.

continued carriage of existing stations.[11] We also seek comment on how we should determine if programming is "substantially duplicated," both for purposes of the medium-sized system exception regarding state networks and the large-sized system exception. Should the definition be the same for both purposes? We propose that a station will be deemed to "substantially duplicate" the programming of another station if more than 50 percent of its weekly prime time programming consists of programming aired on the other station. This alternative is based on the existing definition of "unduplicated broadcast television signal" in Section 76.33(a)(2) of the Commission's rules. Other options include adopting a definition based on all day programming schedules, similar to the one we propose to use to determine whether a municipally-owned NCE station transmits sufficient educational programming to qualify for must-carry status. Furthermore, the definition could use a percentage other than 50 percent of a station's programming week as a cut-off for such determinations. We seek comment on these and other alternatives.

13. In addition, Section 615(c) of the 1992 Act requires that all cable operators continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived upon written consent of the cable operator and the station. Section 615(h) provides that qualified NCE signals shall be available to every subscriber as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals. Under Section 615(d), a cable operator required to add the signals of qualified local NCE stations to its system may do so by placing such additional stations on PEG channels not in use for their designated purposes, subject to approval by the franchising authority. Further, Section 615(f) provides that a qualified local NCE station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to Section 76.92 of the Commission's rules against another qualified local NCE station carried on the system. Finally, Section 615(k) requires a cable operator, upon request by any person, to identify the NCE signals carried on its system in fulfillment of must-carry requirements.

14. We seek comment on these requirements. The 1992 Act provides that a cable operator may place additional required NCE stations on unused public, educational or governmental (PEG) channels. Pursuant to the Communications Act, the franchising authority determines how much of a cable operator's channel capacity, if any, will be set aside for PEG use.[12] If a channel reserved for PEG programming is used to carry an NCE signal when no other channel capacity exists and a qualified PEG user later materializes, what procedures should be followed? In addition, the 1992 Act does not specify any procedures for a cable operator's response to a request to identify channels carried pursuant to must-carry requirements. We seek comment on whether a cable operator should be required to provide this information in writing, if so

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[11] This appears consistent with Congressional intent. Senate Report at 88.

[12] 47 U.S.C. § 531.

requested. We also ask commenters to consider whether it would be appropriate to require a response within a specified time period. Furthermore, we seek comment on whether we should require a cable operator to keep a list of the must-carry signals in its public file.

B. Carriage of Local Commercial Television Stations

15. Signal Carriage Obligations. Section 614(a) states that each cable operator shall carry local commercial television stations and qualified low power stations.[13] Section 614(b) specifies the number of must-carry signals that each cable operator must provide. The operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations. However, such cable systems that serve 300 or fewer subscribers are not subject to any must-carry requirements as long as they do not delete from carriage any signal of a broadcast television station.[14] We expressly request comment on the appropriate interpretation of this exemption. A cable system with more than 12 usable activated channels is required to carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.[15] Beyond these must-carry requirements, the carriage of additional broadcast television signals is at the discretion of the cable operator, subject to retransmission consent, as discussed below in Section IV, and certain statutory exceptions relating to low power stations and network affiliates also discussed below. We request comment on the implementation and enforcement of these requirements.

16. Under Section 614(b)(7), every subscriber of a cable system must receive all signals that are carried to fulfill these must-carry obligations. The must-carry signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box. In such cases, the cable operator shall offer to sell or lease a converter box to such subscribers at rates in accordance with the standards established by the Commission for equipment needed to receive basic cable service pursuant to Section 623(b)(3). We seek comment on the implementation of this provision, especially with respect to the notification requirements concerning those broadcast stations that cannot be viewed without a converter. In addition, upon request by any person, cable operators are required to identify those signals it carries to comply with the must-carry requirements, according to Section 614(b)(8). As discussed above

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[13] The definition of a qualified low power television station and the must-carry rights of such signals are discussed separately below.

[14] Section 614(b)(1)(A).

[15] Section 614(b)(1)(B).

regarding the similar requirement for NCE must-carry signals, we seek comment on implementing this requirement.

17. Definition of a Local Commercial Station. Section 614(h)(1)(A) defines a local commercial television station as any full power commercial television broadcast station licensed by the Commission that is located in the same television market as the cable system. For this purpose, the term local commercial television station does not include: (1) low power television stations, television translator stations, or passive repeaters; (2) a television broadcast station that would be considered a distant signal under Section 111 of the Copyright Act,[16] if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or (3) a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.[17] We propose to add this definition as written to our rules and request comment on this proposal. We also seek comment on the basis for determining the location of the cable system for application of these must-carry provisions. Should it be based on the location of the principal headend? Should the entire geographic area served by the system be considered? Moreover, we ask commenters to consider situations where a cable system is located in more than one market. In this regard, we are concerned with potentially inconsistent carriage obligations being applicable to a single technically integrated system. With respect to the requirement that signals be available at the cable operator's signal processing equipment at specified signal strength levels, we seek comment on what, if any, definitions need to be included regarding how the applicable strengths should be measured. Is it sufficient to simply require that good engineering practices be employed in the associated signal reception process?[18]

18. Definition of a Television Market. Section 614(h)(1)(C) specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the rules, as in effect on May 1, 1991, although the Commission may make modifications it deems necessary.[19] Section 73.3555(d)(3)(i) refers to Arbitron's Area of Dominant Influence (ADI) market

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16 17 U.S.C. § 111. Generally stated, a distant signal under that provision is a broadcast station that could not insist upon cable carriage under the Commission's must-carry rules in effect on April 15, 1976.

17 Section 614(h)(1)(B).

18 It should be noted that the minimum signal level provisions of the 1992 Act largely parallel a provision formerly in the Commission's rules. See Report and Order in MM Docket No. 85-349, supra, at 888.

19 47 C.F.R. § 73.3555(d)(3)(i). We note that in the Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992), the designation of this rule was changed to (e)(3)(i).

definition in applying "national audience reach" under the multiple ownership rules. The ADI, as defined by Arbitron, is a geographic survey area based on measurable patterns of television viewing. Each county in the contiguous United States is assigned exclusively to one ADI. The assignment of a county to an ADI is based on the shares of the county's total estimated television viewing hours. The market whose home stations achieve the largest total share (percentage) of viewing is determined to be the "dominant influence" in that county, and that county is assigned to that market's ADI. Some ADIs are as small as one county; others include many counties encompassing a very large geographic area.[20] To some extent, ADIs change from year to year. How should we accommodate these sporadic changes? Moreover, Arbitron only creates ADIs for counties located in the continental U.S. What should be the market for other areas? In addition, how do we accommodate technically integrated cable systems that serve communities located in more than one county where such counties are assigned to different ADIs by Arbitron?

19. To better reflect market realities and effectuate the purposes of this Act, Section 614(h)(1)(C) permits the Commission to add communities to or subtract communities from a station's television market following a written request.[21] Furthermore, the Commission may determine that particular communities are part of more than one television market. The 1992 Act does not specify whether such requests are to be made by the broadcast station or cable operator. We ask for comment on a proposal to permit either party to make the request. We also seek comment on the appropriate procedures for the written request for communities to be added to or subtracted from the designated market. We believe that it would be preferable to require parties requesting such determinations to file under the provisions of Section 76.7, procedures for petitions for special relief, rather than the rulemaking procedures set forth in Part 1, Subpart C. We believe that consideration of such requests could be expedited if they were filed as petitions for special relief. Would this process be adequate to afford all interested parties sufficient notice? We request comment on this proposal.

20. The 1992 Act specifies that, when considering such requests, the Commission shall afford particular attention to the value of localism by taking into account such factors as 1) whether the station, or similarly situated stations, have been historically carried on the cable system or systems within

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[20] In many cases the size of the ADI is determined by cable carriage of signals in distant counties. For example, the Salt Lake City ADI encompasses the entire state of Utah and portions of Colorado, Idaho, Nevada, and Wyoming -- an area of over 130,000 square miles. Salt Lake City stations collectively garner the largest share of television viewing in those areas and are, therefore, the "dominant influence" by virtue of their cable carriage.

[21] We note that Section 614(h)(1)(C)(iv) mandates that the Commission provide for expedited consideration of such requests. We request comment on the procedures we might adopt to accomplish this goal. We further observe that Section 614(h)(1)(C)(iii) prohibits cable operators from dropping any commercial station pending disposition of requests filed pursuant to this

such community; 2) whether the station provides coverage or other local service to the community; 3) whether any other station qualified for carriage provides coverage of news or programming of local interest; and 4) the local viewing patterns in both cable and noncable homes in the community. We ask parties to consider whether more specific or additional criteria are needed to implement this provision. In particular, we note that under the 1992 Act's definition of "market" the pool of eligible must-carry stations, in some cases, includes stations located hundreds of miles away from the cable system. Should we consider a specific mileage limit (e.g. 50, 70 or 100 miles) when determining whether a station's market should be modified for must-carry purposes? Should such criteria include a standard relating to a station's over-the-air viewability?[22]

21. Section 614(f) requires the Commission to make revisions needed to update Section 76.51 of the existing rules, as part of the implementation of these must-carry provisions.[23] Section 76.51 is a list of the largest 100 television markets and their designated communities derived largely from Arbitron's 1970 prime time household rankings. It is used to identify hyphenated markets and the communities included in those markets. Since Congress specifically directed the Commission to use current ADI markets, pursuant to Section 73.3555(d)(3)(i), for determining must-carry rights, it appears that this action would primarily affect copyright liability under the compulsory license.[24] We note that the existing copyright laws require cable operators to pay royalty fees for the carriage of distant signals. For copyright purposes, local signals not subject to copyright payments are determined by definitions based on the Commission's former must-carry rules. Under those rules, any signal licensed to a designated community of a hyphenated market had carriage rights within the specified (35 mile) zone of all named communities of such a market. We also currently use these market designations for the territorial exclusivity, syndicated exclusivity and

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[22] Historically, signals declared significantly viewed pursuant to Section 76.54 of the Commission's rules have been granted must-carry status. Under the 1992 Act, such signals may not necessarily have must-carry status, although significantly viewed signals continue to be relevant for copyright purposes. However, Section 614(h)(1)(C) instructs the Commission to consider local television viewing patterns when determining the market for must-carry purposes. Since significantly viewed signals attain a "significant" level of viewing within a specified area, should this criterion be used in our determinations?

[23] 47 C.F.R. § 76.51. The purpose of this requirement is unclear since Congress specifically directed us to use current ADI markets, pursuant to Section 73.3555(d)(3)(i), for determining must-carry rights.

[24] It is our understanding that if we modify this list, the Copyright Office would use the revised list for determining copyright liability. See Policy Decision Concerning Federal Communications Commission Action Amending List of Major Television Markets, 52 FR 28362 (Copyright Office, July 29, 1987). To what extent, if any, should we consider the possible copyright implications of any changes we make?

network nonduplication rules.[25]

22. We note that many new television stations have commenced operation since the list was incorporated into the Commission's rules. Many television markets have grown while others have stagnated due to population shifts. The current Arbitron list of ADI television markets is, therefore, somewhat different from the 1970 list.[26] We request specific comment on what modifications to the list of television markets specified in Section 76.51 of our rules are needed to ensure that it reflects current market realities. In particular, we seek commenter guidance regarding the use of Arbitron's list of market designations.[27] We note that Arbitron issues its list annually to reflect changes in population and viewing patterns. The annual Arbitron list provides all ADI market designations, not just the top 100. Should we expand our list to include all markets? Should we provide for an annual update of the top 100 markets? Should we establish procedures to amend the list periodically

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[25] See 47 C.F.R. §§ 73.658(m) (territorial exclusivity); 76.92-97 (network nonduplication); 76.151-163 (syndicated exclusivity).

[26] A comparison of the list of markets in Section 76.51 with Arbitron's current top 100 ADI market list indicates that 14 markets in the original list are no longer ranked in the top 100 markets. See Arbitron's 1991-1992 Television ADI Market Guide. Of the markets that appear on both lists, the designated communities of 23 markets differ between the two lists. In addition, there are 19 cases where the market names differ with our list, including communities in hyphenated markets not included by the recent Arbitron list. We also wish to point out that our original list was not identical to Arbitron's ADI list at the time. For example, our market list in Section 76.51 uses New York-Paterson-Linden-Newark instead of the designation New York, as Arbitron did in 1970. Further, while Arbitron continues to designate the top ranked market New York, it lists stations licensed to each of the following communities within that market: New York, New York; Bridgeport, Connecticut; Newark, New Jersey; Patchogue-Hempstead, New York; Riverhead, New York; Garden City, New York; Montclair, New Jersey; Linden-Newark, New Jersey; Poughkeepsie, New York; Secaucus, New Jersey; and Paterson, New Jersey.

[27] The proceeding we are commencing here, insofar as it addresses revisions to Section 76.51, necessarily overlaps to some extent with the ongoing proceeding in Docket 87-24. See Further Notice of Proposed Rule Making, Gen. Docket 87-24, 3 FCC Rcd 6171 (1988). That proceeding addresses, inter alia, the makeup of the Section 76.51 market list to the extent it provides the reference for: 1) cable television network nonduplication rules; 2) cable television syndicated exclusivity rules; and 3) broadcast station territorial exclusivity rules. In order to facilitate coordination of the overlapping aspects of these two proceedings, we will reopen Docket 87-24 for further comments and reply comments on the same schedule as is used herein. Further, in light of the mandate set forth in Section 614(f) of the Cable Act of 1992, we may in the interim consider ad hoc revisions to the list through individual rulemaking notices. See, e.g., Press Television Corporation, FCC 92-460 (adopted Oct. 1, 1992) (structure of market to be reviewed in separate proceeding).

(e.g., every 3 years)?[28] Alternatively, should we modify individual market designations in response to individual rulemaking petitions?

23. In considering changes to market designations, either for must-carry purposes or for the revision of the list of markets in Section 76.51, we believe that it is important for commenters to consider the potential effects of any modifications to current market designations on other existing rules. Conflicts are likely to occur since these market designations cover different geographic areas. In particular, we are concerned about the situation where a station is entitled to must-carry status on the basis of its ADI at the same time that another station can request deletion of some portion of its programming because the applicable exclusivity and nonduplication rules use the Section 76.51 market list. We seek comment on conforming these rules. What changes are needed to avoid local broadcast station signals simultaneously being subject to mandatory carriage under the new statutory provisions and subject to deletion, in part, under the Commission's network nonduplication and syndicated exclusivity rules?

24. Selection of Signals. The 1992 Act gives the cable operator discretion in selecting the local commercial television stations that shall be carried to fulfill its must-carry requirements in situations where the number of qualified stations exceeds the number of signals a cable system is required to carry. Under Section 614(b)(2), however, two conditions limit the selection of the signals to be carried. A cable operator is not permitted to carry a qualified low power station in lieu of a local commercial television station. Moreover, if the cable operator elects to carry an affiliate of a broadcast network, the cable operator shall carry the affiliate of such broadcast network whose city of license reference point is closest to the principal headend of the cable system.[29]

25. In addition, under Section 614(b)(5), a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. If a cable operator elects to carry on its cable system a signal that substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted towards fulfillment of its signal carriage obligations. This provision is intended to preserve the cable operator's discretion while ensuring that the public has access to diverse

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[28] We note that the Commission updates its list of top 50 markets for purposes of the prime time access rule every three years. See 47 C.F.R. § 73.658(k).

[29] The 1992 Act states that the closest station is determined by comparing the location of the principal headend to the city of license as defined in Section 76.53 of our rules, 47 C.F.R. § 76.53, as of January 1, 1991, or any successor regulation.

local signals.[30]

26. The 1992 Act requires the Commission to define the term "network"[31] for purposes of applying the must-carry provisions in situations where the programming schedules of two or more stations are similar. While Section 614(b)(2) and one part of Section 614(b)(5) address duplicating network affiliates, a second part of Section 614(b)(5) addresses any duplicating local commercial signal and seems to have the same intent. Thus, we believe that it would be appropriate to fashion a definition of network that incorporates the substantial duplication concept. This could be accomplished by borrowing from one of the established network definitions or by fashioning a new definition based entirely on the amount of duplicative programming involved rather than on the source of that programming.[32] We request comment on how a network affiliate should be defined for purposes of these provisions and on what objectives we should seek to accomplish by that definition. In particular, parties are asked to suggest the relevant comparisons of the schedules of stations for determining whether their programming is sufficiently duplicative. Should the comparisons be based on programming throughout the day or only selected dayparts, such as prime time? What cut-off should we choose for these determinations (e.g., more than 50 percent)?[33] Moreover, should we use the

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[30] Senate Report at 85.

[31] This requirement is set forth in Section 614(b)(2)(B) and noted in Section 614(b)(5).

[32] We observe that the Chain Broadcasting Report and early radio rules defined a network organization as one that provides programming to two or more interconnected stations for simultaneous broadcast. See Report on Chain Broadcasting, Commission Order No. 37, Docket 5060 (May 1941). See also 47 C.F.R. §§ 73.132 and 73.232 (radio territorial exclusivity rules); 47 C.F.R. § 73.658(a) (exclusive affiliation of station rule). We also note that the Communications Act of 1934, as amended, defines the term "chain broadcasting" as "the simultaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(p). Moreover, for the prime time access and financial interest and syndication rules, a "network" is defined as an entity that provides 15 hours of prime time programming per week on a regular basis to interconnected affiliates that reach at least 75 percent of the television households nationwide. See C.F.R. § 73.662(i). However, it appears that this latter definition would not meet the objectives of the 1992 Act since it is too encompassing.

[33] We wish to point out some related definitions and terms from our existing rules for consideration in this context. The current effective competition standard defines an "unduplicated broadcast signal" as "one that does not simultaneously duplicate more than 50 percent of another signal's weekly prime time schedule pursuant to the definition of 'prime time' provided in § 76.5(n). See 47 C.F.R. § 76.33(a)(2). Furthermore, in the revised must-carry rules adopted in 1986 we defined "substantially duplicates" in the context of network affiliates. That definition was "regularly duplicates the network programming of one or more stations in a week during the hours of 6 to

same standard as that proposed for NCE stations regarding substantial duplication?

27. Low Power Television Stations. Section 614(a) requires cable operators to carry the signals of qualified low power television (LPTV) stations under certain circumstances. The legislative history indicates that Congress believes that the public interest would be served by carriage of LPTV stations in communities where there is limited access to signals of full power stations providing local news and information.[34] For this purpose, Section 614(h)(2) defines an LPTV station as "qualified" if that station conforms to the Commission's LPTV rules,[35] broadcasts for at least the minimum number of hours required of television stations by the Commission[36] and adheres to certain Commission requirements regarding nonentertainment programming and employment.[37] These include all obligations applicable to full power stations under Part 73 of our rules with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials and personal attacks; programming for children; and equal employment opportunity. In addition, an LPTV station will not be "qualified" unless the Commission determines that the provision of programming by such station would address local news and informational needs that are not being adequately fulfilled by full power television stations because such full power stations are distant from the LPTV station's community of license.

28. In addition, an LPTV station will not be considered qualified under the 1992 Act unless that station complies with interference regulations consistent with its secondary status pursuant to the Commission's rules,[38] and unless it is within 35 miles of the cable system's headend and delivers to the headend a good quality over-the-air signal as determined by the Commission. Moreover, an LPTV station will only be considered qualified if its community of license and the franchise area of the cable system were both located outside of the largest 160 Metropolitan Statistical Areas (MSAs) on June 30, 1990, and the population of the LPTV community of license on that date did not exceed 35,000. In addition, an LPTV station will only qualify if there is no full power television station licensed to any community within the county or other political subdivision (of a state) served by the cable system.

29. The above criteria define those LPTV stations that will be

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11 p.m., local time, for a total of more that 14 hours." See Report and Order in MM Docket No. 85-349, supra, at 908.

34 Conference Report at 74.

35 See 47 C.F.R. §§ 74.701-74.784.

36 See 47 C.F.R. § 73.1740.

37 See 47 C.F.R. Part 73.

38 See 47 C.F.R. § 74.703.

considered "qualified" pursuant to the 1992 Act so as to be included in the carriage requirements of a cable operator if there are not enough local full power stations to fulfill the cable operator's must-carry obligations.[39] We seek comment on the implementation of this definition. Is a case-by-case review of the operations of individual LPTV stations required to determine whether they qualify for must-carry rights or can general rules be relied on? What factors should determine whether a full power station is local? Should we use the market-based definition set forth in Section 614(h)(1)? Should a specific mileage limit be established? Should the limit be based on county or state boundaries? We note that pursuant to Section 614(h)(2)(F), an LPTV station will not be qualified if there is a full power station licensed to any community within the county or other political subdivision served by the cable system. What procedures should be followed if a full-power station comes on the air that would preempt the LPTV station's must-carry rights? We propose to require the cable operator to give notice to the LPTV station at least 30 days before discontinuing carriage of the LPTV signal. We request comment on whether the cable operator should also be required to notify subscribers. In addition, we seek comment on that aspect of the LPTV definition regarding LPTV stations that the Commission determines would address local news and informational needs that are not being adequately fulfilled by full power stations in the area. What criteria should the Commission consider in determining whether an LPTV station will serve community needs? In what situations must the Commission make such a finding? We tentatively interpret the 1992 Act to require that the Commission make a determination regarding fulfillment of community needs only if an LPTV station asserts must-carry rights against a cable operator and is refused carriage.

30. When a particular LPTV station is determined to be qualified for must-carry protection, Section 614(c) delineates the degree of carriage required of the cable operator. Cable operators are only required to carry LPTV stations if there are not sufficient signals of full power local commercial television stations to fill the channels set aside under Section 614(b). If such is the case, cable systems with a capacity of 35 or fewer usable activated channels are required to carry one qualified low power station. Cable systems with a capacity of more than 35 usable activated channels are required to carry two qualified low power stations. A cable operator required to carry more than one signal of a qualified LPTV station may place the additional station on public, educational or governmental (PEG) channels not in use for their designated purposes, subject to approval by the franchising authority. We seek comment on implementation of these carriage requirements. If a PEG channel is being used to carry an LPTV signal and a qualified PEG user later materializes, when no other channel capacity is available, what procedures should be followed in the event the franchising authority withdraws its approval for use of the PEG channel?

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[39] Since the effect of the 1992 Act is to create two classes of LPTV stations -- those qualified for must-carry status and those not -- should changes be made to the low power television rules, Part 74, to reflect this distinction? We note, of course, that Section 614(h)(2) specifically states that nothing in this paragraph should be construed to change the secondary status of any LPTV station.

31. Sales Presentations and Program Length Commercials. Section 614(g) requires that the Commission conduct a proceeding to determine whether broadcast television stations that are predominantly used for the transmission of sales presentations or program length commercials serve the public interest, convenience, and necessity. Such a proceeding will be initiated in a forthcoming Commission Notice. Pending the outcome of that proceeding, Section 614(g) provides that a cable operator will neither be required to carry nor prohibited from carrying the signal of a commercial television station or video programming service that is predominantly used for these purposes.[40] We seek comment on implementation of this provision. Until a final definition of "predominantly utilized for the transmission of sales presentations or program length commercials" is adopted, we propose to establish an interim definition. Specifically, we seek comment on whether, on an interim basis, to consider channels to be "predominantly utilized" for such purposes if more than 50 percent of their programming week consists of sales presentations or program length commercials.

C. Provisions Applicable to Commercial and Noncommercial Stations

1. Manner of Carriage

32. Content to be Carried. Section 614(b)(3)(A) requires a cable operator to carry, in its entirety,[41] the primary video, accompanying audio, and line 21 closed caption transmission of local commercial television stations and, to the extent technically feasible, to carry program-related material contained in the vertical blanking interval or on subcarriers.[42] Section 615(g)(1) includes the same requirements for carriage of NCE stations, but specifically mentions that cable operators shall carry program-related material

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[40] Section 614(g)(2) provides that if the Commission determines in its subsequent proceeding that stations primarily transmitting program length commercials and sales presentations serve the public interest, such stations will qualify as local commercial television stations for purposes of the must-carry rules. If the Commission finds that these stations do not serve the public interest, licensees will be given a reasonable period within which to provide different programming, and will not be denied a renewal expectancy solely on this basis.

[41] Section 614(b)(3)(B) provides that the cable operator shall carry the entirety of the program schedule of any television station included on its system unless carriage of specific programming is prohibited, and other programming is authorized to be substituted, pursuant to Section 76.67 (regarding sports broadcasts) or Subpart F of Part 76 of the Commission's rules (regarding nonduplication protection and syndicated exclusivity).

[42] In enforcing this provision, it would appear desirable to parallel the related copyright treatment. See WGN Continental Broadcasting v. United Video, 51 RR 2d 1617 (7th Cir. 1982) (copyright of a television program includes program material encoded in the vertical blanking interval when "related images" are involved).

contained in the vertical blanking interval or on subcarriers "that may be necessary for receipt of programming by handicapped persons or for educational or language purposes." Both sections provide that retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator. The 1992 Act also provides that cable operators may delete signal enhancements, such as ghost-canceling, from the signal of a commercial station and employ such enhancements at the system headend or headends (Section 614(b)(3)(A)). We seek comment on implementation of these requirements. Should we presume that systems may delete signal enhancements for noncommercial stations, even though this is not specifically mentioned in the 1992 Act? When is carriage of certain information in the vertical blanking interval or on subcarriers "technically feasible?"

33. Channel Positioning. Section 614(b)(6) provides that the signals of local commercial television stations carried pursuant to these must-carry rules shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator.[43] Similarly, Section 615(g)(5) requires that NCE signals carried pursuant to must-carry protection appear on the cable system channel number on which the qualified local NCE station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. In either case, disputes regarding channel positioning are to be resolved by the Commission. We recognize that, under these provisions, more than one station may seek and have a valid claim to the same cable channel. Thus, we seek comment on whether a formal priority structure should be established, e.g., should priority be given to a station's channel position on the July 19, 1985 or to its over-the-air channel assignment. We note that stations often seek, in cooperation with local cable operators, to obtain carriage on a uniform channel throughout their service areas. What consideration should such uniformity be given in resolving channel positioning disputes? Alternatively, should system operators be permitted to make a selection within the constraints otherwise established in order to minimize disruption to consumers? We also seek comment on the relationship between the "on-channel" carriage provisions and the obligations of system operators to establish a "basic service tier" containing, at a minimum, all of the signals of stations entitled to mandatory carriage (Section 623(b)(7)). It is our assumption that Congress intended that stations be entitled to their over-the-air channel position only when that channel is encompassed by the basic service tier on the system. Thus, for example, a system with a basic tier encompassing channels 2 through 12 would not need to provide a local station broadcasting on channel 50 with on-channel carriage. We seek comment on all these matters regarding channel positioning requirements.

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[43] Congress indicated that in no event would an agreement concerning channel positioning entered into prior to July 1, 1990, or the expiration of such an agreement, relieve a cable operator of any must-carry requirements. Conference Report at 75.

34. Signal Quality. Section 614(b)(4)(A) provides that the signals of local commercial television stations shall be carried without material degradation. That section directs the Commission to adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.[44] In addition, Section 615(g)(2) requires cable operators to provide qualified local NCE television stations with bandwidth and technical capacity equivalent to that provided to commercial television stations carried on the cable system, and to carry the signal of such stations without material degradation.

35. We seek comment on implementation of these requirements. We note that our recent Cable Technical Report and Order[45] adopted wide-ranging cable technical standards, and we believe that those standards should satisfy the requirements of the 1992 Act.[46] Our current technical standards, taken as a whole, ensure that no material degradation occurs on any video signal delivered to a subscriber. The Cable Technical Report and Order specifically addressed the issue of preventing material degradation to local television signals carried on cable systems by providing that cable operators must make reasonable efforts and use good engineering practices and proper equipment to guard against unnecessary degradation in the signal received and delivered to the cable subscriber. We also encouraged cable operators to work with broadcasters to resolve problems affecting the quality of a particular signal prior to its reception at the cable headend. However, the Cable Technical Report and Order also provided that cable operators will not be required to take extraordinary measures to improve upon signals over which they have no control. We invite comment on the applicability of the standards adopted in the Cable Technical Report and Order to the current proceeding and on what, if any, changes need to be made in these rules to reflect the requirements of Section 614(b)(4)(A).

36. In addition, Section 614(h)(1)(B)(iii) provides that a cable operator is not required to carry a local commercial television station that does not deliver to the principal headend of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, if the station does not agree to bear the costs of delivering a good quality signal or a baseband video signal.

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44 We believe it is clear from the overall context that the comparability of treatment specified is intended to be between "NTSC" broadcast and cable origination channels.

45 See Report and Order in MM Docket Nos. 91-169 and 85-38, 7 FCC Rcd 2021 (1992), (Cable Technical Report and Order) and Memorandum Opinion and Order in MM Docket Nos. 91-169 and 85-38, FCC 92-508, adopted November 10, 1992 (Cable Technical Reconsideration).

46 Technical standards for consumer electronics equipment compatibility required under Section 16 of the 1992 Act shall be addressed in a separate proceeding.

Similar, but slightly different, requirements are contained in Section 614(h)(2)(D) for qualified low power stations. Similarly, Section 615(g)(4) provides that a cable operator shall not be required to carry the signal of any qualified local NCE television station that does not deliver to the cable system's principal headend a good quality signal or baseband video signal. We note our proposed definition of "principal headend" above in Section III-B and seek comment on additional rules needed to implement these requirements.

2. Procedural Requirements

37. Notification Regarding Deletion or Repositioning of Channels. Section 614(b)(9) requires a cable operator to provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. A cable operator may not delete or reposition a local commercial station during a ratings period.[47] With respect to qualified NCE stations, Section 615(g)(3) requires a cable operator to provide written notice to the station and all subscribers of the cable system at least 30 days before repositioning that station. For purposes of Section 615, "repositioning" includes both reassignment of the station to another channel number and deletion of the station from the cable system. Thus, we propose that cable operators be required to give the station (and subscribers in the case of NCE stations) at least 30 days' notice before deleting a must-carry signal or moving such station to another channel. Additionally, can or should cable operators be required to notify subscribers of the deletion or repositioning of a commercial must-carry signal?

38. Compensation for Carriage. Sections 614(b)(10) and 615(i) prohibit a cable operator from accepting or requesting compensation for carriage or for channel positioning of any commercial or NCE television station carried in fulfillment of the mandatory carriage provisions. Those sections provide, however, that the station, commercial or NCE, may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system. Moreover, the cable operator may accept payments from commercial must-carry stations that would be considered distant signals pursuant to the Copyright Act, 17 U.S.C. Section 111, as indemnification for any increased copyright liability as a result of carrying the signal. Similarly, a cable operator shall not be required to carry a qualified local NCE station not already being carried that would be considered a distant signal for copyright purposes absent indemnification for any increased copyright costs. In addition, a cable operator may continue to accept payment for carriage or channel positioning of the signal of a local commercial television station entitled to must-carry protection through the expiration of an agreement providing for such compensation between the cable

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[47] We note that Arbitron and A.C. Nielsen conduct surveys on television viewing throughout the year. However, all television markets are included only in four, four-week audience sweep periods -- roughly February, May, July and November -- every year. We note that the legislative history refers to these sweep periods (Senate Report at 86) and we seek comment on whether it is reasonable to prohibit deletion or channel repositioning solely during these four national ratings periods.

operator and the local commercial television station entered into prior to June 26, 1990. We seek comment on implementation of these provisions.

39. Remedies. Section 614(d)(1) provides that whenever a local commercial television station believes that a cable operator has failed to meet its must-carry obligations, such station shall notify the operator, in writing, of the alleged failure.[48] Such broadcast station is required to identify its reasons for believing that the cable operator is obligated to carry the signal or has otherwise failed to comply with channel positioning or repositioning or other requirements.[49] The cable operator shall, within 30 days of such written notification, respond in writing and agree to carry the signal or state its reasons for believing that it is not obligated to do so, or, in the case of a channel positioning dispute, agree to the channel position requested or state that it is in compliance with the 1992 Act. A local commercial television station that is denied carriage or channel positioning or repositioning by a cable operator, or that does not receive a timely response from the cable operator, may file with the Commission a complaint describing how the cable operator has failed to meet its obligations and the basis for the station's allegations.[50] As set forth in Section 615(j), if a local NCE station believes that a cable system has failed to fulfill its must-carry obligations, that NCE station need not first notify the cable system but may immediately file a complaint with the Commission. The Commission must afford cable operators the opportunity to respond to such complaints. We seek comment on the implementation of these requirements. We propose that all such complaints be served on cable operators, who would then be afforded 10 days to respond in writing. We also ask commenters to consider whether there should be a time limit on the filing of such complaints and if the Commission has the authority to impose such a time limit. For example, can or should we require a commercial station filing a complaint with the Commission do so within 30 (or

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[48] The 1992 Act uses the term local commercial station to refer to full power signals. Thus, this section appears not to provide for LPTV stations. We believe that it would be appropriate for LPTV stations entitled to carriage to be accorded the same rights as other local commercial must-carry signals in this regard. We seek comment on this matter.

[49] We note that, in the absence of must-carry rules, the Commission established a process to resolve complaints from local broadcast stations that allege competitive harm by a network-owned cable system with respect to carriage, channel repositioning or "by-passing" when it revised the network-cable cross-ownership rules. See Report and Order in MM Docket No. 82-434, 7 FCC Rcd 6156 (1992) reconsideration pending. We request comment regarding the effect of the 1992 Act on that process and the extent to which the more specific statutory carriage obligations take precedence over our Docket 82-434 requirements.

[50] The legislative history indicates that this section is not intended to deprive federal or state enforcement authorities or other parties any rights or remedies which they may have under other laws relating to competition or consumer interests, nor is it intended to deprive parties of any contractual remedies. Senate Report at 87.

60) days of the date of the cable operator's written response to its notification? Can or should an NCE station filing a complaint with the Commission be required to do so within 30 (or 60) days of the triggering action by the cable operator (e.g., discontinuing carriage, repositioning, refusing carriage upon request)? Additionally, in the case of a commercial station being denied carriage or channel positioning, we propose that the station be permitted to file a complaint with the Commission immediately upon receipt of the cable operator's response (i.e., the station does not have to wait for expiration of the 30-day period).

40. The 1992 Act also provides that within 120 days after the date a complaint is filed with the Commission, the Commission shall determine whether the cable operator has met its must-carry obligations. If the Commission determines that the cable operator has complied with the must-carry rules, it shall dismiss the complaint (Sections 614(d)(3) and 615(j)(3)). If the Commission agrees with the broadcast station's complaint, it will order the cable system to take remedial action. Section 614(d)(3) specifically provides that if a cable system is determined to have wrongfully refused carriage of a local commercial station, the Commission shall order the cable operator to begin carrying that station and to continue such carriage for at least 12 months. With respect to remedies for NCE stations, Section 615(j)(3) provides that the Commission shall take such remedial actions as are necessary. We seek comment on implementation of these remedial provisions in the 1992 Act. We also request comment on whether we should apply the provisions of Section 76.7 of the Commission's rules (the special relief rules), perhaps with a shorter time period for responsive pleadings, as indicated above, to expedite such complaints, or whether we should use standard notice and comment procedures. We note that we currently use Section 76.7 for the resolution of disputes regarding the existing effective competition standard.[51] We also note that Section 8 of the Communications Act of 1934 as amended requires parties filing requests for special relief in the cable area to pay fees, yet mass media enforcement actions are generally exempt from the fee requirement.[52] Since these remedies are a form of enforcement action, should fees be waived in such cases?

IV. RETRANSMISSION CONSENT

A. Introduction

41. The Cable Act of 1992 amends Section 325 of the Communications Act of 1934 by adding provisions governing retransmission of broadcast signals by cable systems and other multichannel video programming distributors. A multichannel video programming distributor (or "multichannel distributor") is "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for

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51 47 C.F.R. §76.33(c).

52 47 U.S.C. § 158.

purchase, by subscribers or customers, multiple channels of video programming."[53]

42. The scope of this definition is important for two reasons: (1) it defines the entities subject to the retransmission consent requirement; and (2) "multichannel video program programming distributor" is used extensively in other parts of the 1992 Act, e.g., in connection with the effective competition definition (Section 3), program access (Section 9), program ownership (Section 11), program carriage agreements (Section 12), and equal employment opportunity (Section 22). Thus, as a preliminary matter, we seek comment on the scope of this definition. For example, does it encompass satellite master antenna or master antenna television systems?[54] We also note that, although the literal language of the "multichannel video program distributor" definition is broad in its coverage, its objective appears to leave the Commission flexibility to create a measure of regulatory parity among entities that are "in the same market" and, generally, at the same distribution level with cable systems. Further, where there is a differentiation between an entity performing a service delivery function and an entity selling programming that is delivered over the facilities of another, it appears logical that the retransmission consent obligation should fall on the entity directly selling programming and interacting with the public. Under this approach, the obligations would fall on a "wireless cable" provider using leased MMDS and ITFS facilities rather than on the MMDS and ITFS licensees. Similarly, where there is a chain of distribution to the public potentially involving more than one multichannel video program distributor, it would appear consistent with the objectives of the 1992 Act for the obligation involved to inure to the distributor in the chain that interacts directly with the public. Thus, for example, the obligation would not fall on a microwave common carrier delivering multiple channels of programming to cable system customers, but would be the obligation of the cable systems involved. We seek comment on these definitional issues.

43. Section 325 as amended also directs the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection."[55] The general prohibition of retransmission without broadcaster consent in 47 U.S.C. Section 325(b)(1) applies to the signal of any "broadcasting station" and is not expressly limited to television stations. However, the 1992 Act directs the Commission to undertake a rulemaking proceeding applicable to "television

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53 47 U.S.C. § 522(12).

54 Related to this definitional question is the question of whether any distinctions in the manner of applying the retransmission consent provisions are warranted based on whether the entity involved is covered or not covered by the compulsory copyright licensing provisions of the Copyright Act.

55 47 U.S.C. § 325(b)(3)(A).

broadcast stations" (emphasis added).[56]

44. This section addresses five issues relevant to retransmission consent. First, we review the scope of retransmission consent. Second, we outline the proposed schedule for implementation of retransmission consent, including the election by stations of retransmission consent or must-carry rights. Third, we examine the relationship between retransmission consent and Section 614 of the 1992 Act. Fourth, we address a limited number of issues relating to the retransmission consent contracts that stations and cable operators might sign. Fifth, we address the requirement of Section 325(b)(3)(A) to ensure that our retransmission consent rules do not conflict with our obligation under Section 623(b)(1) to keep cable basic service tier rates reasonable. We seek comment on all of the specific proposals and interpretations of the Cable Act of 1992 mentioned herein.

B. The Scope of Retransmission Consent

45. The 1992 Act provides that, "[F]ollowing the date that is one year after the date of enactment,"[57] no cable system or other multichannel distributor "shall retransmit the signal of a broadcasting station, or any part thereof, except--(A) with the express authority of the originating station; or (B) pursuant to Section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section."[58] As discussed in the preceding section of this Notice, Section 614 of the 1992 Act details cable operators' obligation to carry local commercial television signals. Within one year of the date of enactment, and every three years thereafter, television stations covered by Section 325(b) are required to elect either retransmission consent rights or must-carry rights under Section 614.[59] Each television station will make a single election for each cable system in its market. The 1992 Act provides that if there is "more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems." Based on the legislative history, we construe this to mean that a station must make the same election for all directly competing cable systems, but that it could make different elections for cable systems

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[56] It is not evident from the legislative history and from the context in which the 1992 Act was adopted whether Congress intended to apply the retransmission provisions to signals other than television signals. Thus, we seek comment on what, if any, action the Commission can or should take with respect to retransmission of radio signals by multichannel distributors.

[57] The Cable Act of 1992 was enacted on October 5, 1992. Hence, the retransmission consent provisions become effective on October 6, 1993.

[58] 47 U.S.C. § 325(b)(1).

[59] 47 U.S.C. § 325(b)(3)(B). The election requirement applies only to commercial television stations. See 47 U.S.C. § 325(b)(2)(A).

that are in the same local television market but do not overlap.[60] We recognize that cable system service areas sometimes overlap without being identical. Accordingly, we seek comment on what degree of overlap between cable system service areas should trigger the "same election" requirement. We also observe that, when commercial television stations make an election between must-carry and retransmission consent rights, they necessarily do it only with regard to retransmission within the local market, since Section 614 requires carriage of certain "signals of local television stations."[61] Out-of-market retransmission of a commercial television station's signal will occur only pursuant to a retransmission consent agreement.

46. There are four exceptions to the above retransmission consent requirement. It does not apply to (1) noncommercial broadcasting stations; (2) retransmission directly to a home satellite antenna of the signal of a broadcast station that is not owned or operated by, or affiliated with, a broadcasting network, provided that the signal was retransmitted by a satellite carrier on May 1, 1991; (3) retransmission directly to a home satellite antenna of the signal of a network owned or affiliated broadcasting station, provided the household receiving the signal is an unserved household; and (4) retransmission by a cable operator or other multichannel distributor of a superstation signal, provided that the signal was obtained from a satellite carrier and the originating station was a superstation as of May 1, 1991.[62]

47. As noted above, the exceptions to the retransmission consent requirement include certain out-of-market retransmissions of television signals if the signal is delivered via satellite. However, out-of-market retransmissions of television signals that are delivered to a cable system or other multichannel distributor by other means, such as microwave, or whose satellite carriage began after May 1, 1991, are not exempt from retransmission consent requirements. Those signals can only be retransmitted by cable systems or other multichannel distributors "with the express authority of the originating station."

C. Implementing Retransmission Consent

48. Because commercial television stations are required to choose between retransmission consent and must-carry rights, the implementation of the new Section 325(b) and the new Section 614 must be addressed jointly. The Commission is required to complete its retransmission consent rulemaking

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60 Conference Report at 76. "In situations where there are competing cable systems serving one geographic area, a broadcaster must make the same election with respect to all such competing cable systems." See also Senate Report at 33. (The election "will apply to any so-called overbuild systems which serve the same geographic area.")

61 Section 614(a).

62 The terms "satellite carrier," "superstation," and "unserved household" are defined in 17 U.S.C. § 119(d) as in effect on the date of enactment of the 1992 Act. See 47 U.S.C. § 325(b)(2).